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Supreme Court, U.S.
FILED
071251 APR 2 - 2008
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

ANTHONY ALEXANDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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April 2, 2008

QUESTION PRESENTED

Whether a federal Drug Enforcement Agency laboratory report prepared for use in a criminal prosecution is a "testimonial statement" subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

PARTIES TO THE PROCEEDING

The parties below were (1) Anthony Alexander, (2) Alexander's co-defendant George Moon, and (3) the United States of America.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED ... 1
STATEMENT OF FACTS 2
Reasons for Granting the Writ 7
I. The *Melendez-Diaz* Petition Established The Importance Of The Federal And State Court Controversy Over Whether Laboratory Test Results Constitute "Testimonial" Evidence Subject To Confrontation Clause Analysis 8
II. This Petition Should Be Granted And Set For Hearing On The Same Date As *Melendez-Diaz* Because The Court Of Appeals Introduces Novel Arguments That Must Be Addressed To Answer Fully The Important Question Presented .. 11
III. This Petition Is The Proper Vehicle For Addressing The New Rationales Accepted By The Court Of Appeals Because The Outcome Of The *Melendez-Diaz* Case May Compel Reversal Or Remand In This Case 15
CONCLUSION 20

TABLE OF APPENDICES

Appendix A -- Opinion of the United States Court of Appeals for the Seventh Circuit Dated and Filed January 3, 2008 ..... 1a - 9a

Appendix B -- Seventh Circuit Order Granting Mr. Alexander's Motion for Reconsideration in Light of *Melendez-Diaz* ..... 10a - 11a

Appendix C -- Excerpt of Petition for Writ Certiorari, *Melendez-Diaz v. Massachusetts*, Docket No. 07-591 .. 12a - 16a

Appendix D -- Trial Transcript, Excerpted Testimony of James DeFrancesco ..... 17a -56a

TABLE OF AUTHORITIES

FEDERAL CASES

Brecht v. Abrahamson, 507 U.S. 619 (1993) 15

Chapman v. California, 386 U.S. 18 (1967) 15

Crawford v. Washington, 541 U.S. 36 (2004) ... 8, 9

Davis v. Washington, 547 U.S. 813 (2006) 9

Fahy v. State of Connecticut, 375 U.S. 85 (1963) 15

Ohio v. Roberts, 448 U.S. 56 (1980) 8

Paddack v. Dave Christensen, Inc., 745 F. 2d 1254 (9th Cir. 1984) 17

United States v. 0.59 Acres of Land, 109 F. 3d 1493 (7th Cir. 1997) 17

United States v. Lane, 474 U.S. 438 (1986) 15

United States v. Lawson, 653 F.2d 299 (7th Cir. 1981) 18

United States v. Washington, 498 F.3d 225 (4th Cir. 2007), *petition for cert. filed*, (U.S. Dec. 14, 2007) (No. 07-8291) 5, 14

STATE CASES

City of Las Vegas v. Walsh, 124 P.3d 203 (Nev. 2005), *cert. denied*, 547 U.S. 1071 (2006) 11

Commonwealth v. Verde, 827 N.E.2d 701 (Mass. 2005) 10, 11

Hinojos-Mendoza v. People, 169 P.3d 662 (Colo. 2007), *petition for cert. filed*, (U.S. Feb. 4, 2008) (No. 07-9369) 10, 12

People v. Geier, 161 P.3d 104 (Cal. 2007), *petition for cert. filed*, (U.S. Nov. 14, 2007) (No. 07-7770) 10, 11-12

Roberts v. United States, 916 A.2d 922 (D.C. 2007) 10

State v. Caulfield, 722 N.W.2d 304 (Minn. 2006), *petition for cert. filed*, (U.S. Feb. 1, 2008) (No. 07-9567) 11

State v. Forte, 629 S.E.2d 137 (N.C. 2006), *cert. denied*, 127 S. Ct. 557 (2006) 10

State v. March, 216 S.W.3d 663 (Mo. 2007), *cert. dismissed*, __ S. Ct. __, 2007 WL 1825157 (Oct. 5, 2007) 10-11

State v. O'Maley, 932 A.2d 1 (N.H. 2007), *petition for cert. filed*, (U.S. Nov. 7, 2007) (No. 07-7577) 10, 11-12

OTHER REFERENCES

1 Kenneth S. Broun, MCCORMICK ON EVIDENCE (6th pract. ed. 2006) 8

Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475 (2006) 12

Marianne Heal, *Drug Testing in the Workplace: The Need for Quality Assurance Legislation*, 48 OHIO ST. L.J. 877 (1987) 13

U.S. Dep't of Justice, Project Advisory Committee, Laboratory Proficiency Testing Program, Supplementary Report--Samples 6-10 (1976) 13-14

Andrew P. Thomas, *The* CSI *Effect: Fact or Fiction*, 115 YALE L.J. POCKET PART 70 (2006), http://www.thepocketpart.org/2006/02/thomas.html 16-17

PETITION FOR A WRIT OF CERTIORARI

Anthony Alexander respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

This Petition seeks the review of the decision of the United States Court of Appeals for the Seventh Circuit in *United States v. Moon*, reprinted at App. A, 1a-9a, and published at 512 F.3d 359. The court of appeals affirmed the entry of judgment of conviction of the United States District Court for the Northern District of Indiana.

JURISDICTION

The court of appeals entered judgment on January 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

Federal Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type

> reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

STATEMENT OF FACTS

On February 28, 2005, a jury found Petitioner Anthony Alexander guilty on four counts of distributing cocaine, one count of distributing marijuana, one count of conspiracy to distribute illegal drugs, and two counts of using his telephone in furtherance of drug dealing. Before the verdict, the district court had instructed the jury that, to find Mr. Alexander guilty of the illegal drug distribution charges, they first had to find that the prosecution had proven, beyond a reasonable doubt, that Mr. Alexander had, in fact, distributed cocaine and marijuana.

The only evidence that the substances that Mr. Alexander had sold and possessed were illegal drugs was a report from a Drug Enforcement Agency (DEA) laboratory, authored by a DEA forensic chemist named Ragnar Olson. The report documented the protocol Olson used to test the allegedly illicit

substances, and it reflected Olson's conclusion that the substances seized from Mr. Alexander were illegal drugs.

The government never called Olson to testify about his report, and Mr. Alexander never had the opportunity to confront Olson about his competence and qualifications, his possible biases and prejudices, his testing methodology, or his conclusions. Instead, the government put a senior DEA forensic chemist, James DeFrancesco, on the stand as an expert witness. *See* Trial Transcript, Excerpted Testimony of James DeFrancesco, attached hereto as App. D, at 17a - 58a.

On direct examination, DeFrancesco testified in response to a question of how he prepared to testify at trial:

> I reviewed [Olson's] paperwork. I reviewed his data and made sure that all his conclusions were supported by the data. Mine were not the first set of eyeballs on his work. It's checked at many levels. And I have full confidence in his ability to carry out his assignment. So I had no reason to believe that his work was not going to be righteous. In my opinion, he did just fine.

(*Id.*, Tr. 5/97, at 18a)

With regard to Government Exhibit 1, a package allegedly containing plant material, DeFrancesco testified that Olson received the package and performed tests to identify the material. (*Id.*, Tr. 5/98-100, at 19a-22a). DeFrancesco testified that the

first test Olson performed was a color test, called the "Ducanoid and Levin Test." (*Id.*, Tr. 5/101, at 23a). DeFrancesco testified that Olson also performed a "microscopic test" where he examined the material under a microscope. (*Id.*) The colloquy continued:

> Q: So Mr. Olson, he was able to form an expert opinion as to the contents of that exhibit?
>
> A: Yes.
>
> Q: What was his expert opinion?
>
> A: That it was marijuana.
>
> Q: Now, after reviewing his notes and the procedures he took and the lab report, are you able to form an expert opinion as to the contents of Exhibit 1?
>
> A: Yes.
>
> Q: And what is your expert opinion?
>
> A: I concur with his in that it was marijuana.

(*Id.*, Tr. 5/103, at 26a).

DeFrancesco testified in a similar manner with regard to several other government exhibits that purportedly contained cocaine. (*Id.*, Tr. 5/109-134, at 27a-56a). He stated that Olson received the exhibit and performed tests to identify the substance and that Olson reached the conclusion that the substance contained cocaine, in either powder or base form. (*Id.*, Tr. 5/109-112, at 27a-30a; Tr. 5/114-116, at 33a-35a; Tr. 5/117-119, at 37a-38a; Tr. 5/119-121, at 39a-

41a; Tr. 5/122-124, at 42a-45a; Tr. 5/131-132, at 54a). With regard to each exhibit, DeFrancesco testified that, after reviewing Olson's notes and conclusions, he "concur[red]" with Olson's conclusions. (*Id.*, Tr. 5/112, at 31a; Tr. 5/116, at 35a-36a; Tr. 5/119, at 38a-39a; Tr. 120, at 39a-40a; Tr. 5/124-125, at 45a-46a; Tr. 5/132, at 54a-55a).

The court entered judgment of conviction against Mr. Alexander on February 28, 2006. On March 1, 2006, Mr. Alexander filed an appeal pursuant to Federal Rule of Appellate Procedure 4(b).

In his appeal, Mr. Alexander argued that the district court erred in allowing DeFrancesco to testify in the place of Olson, who had authored the lab report. Mr. Alexander claimed that this error denied him his Sixth Amendment right to cross-examine and confront Olson, the person who conducted the lab tests and reached the ultimate conclusions that were the only evidence of the nature of the substances seized from Mr. Alexander.

In affirming Mr. Alexander's conviction, the court of appeals held that part of the lab report was "testimonial" under the Sixth Amendment Confrontation Clause, and part was not "testimonial." The court of appeals distinguished between "two kinds of information: the readings taken from the instruments, and Olson's conclusion that these readings mean that the tested substance was cocaine." (App. A at 4a.) Relying on *United States v. Washington*, 498 F. 3d 225 (4th Cir. 2007), *petition for cert. filed*, (U.S. Dec. 14, 2007) (No. 07-8291), the court of appeals also held that the

readings from the instruments were "not 'statements' in any useful sense." (*Id.*) Even if they were "statements," the only "declarant" would be the machine itself, and the court of appeals asked rhetorically, "how could one cross-examine a gas chromatograph?" (*Id.*) Ultimately, the court of appeals held that "DeFrancesco was entitled to analyze the data that Olson had obtained," and that, although "Olson's own conclusions based on the data should have been kept out of evidence," those inferences and conclusions were not harmful to the defendants, because DeFrancesco gave his own expert opinion identifying the substances. (*Id.* at 5a). The court of appeals also asserted that "[a]ny competent chemist" would have reached the same conclusions as Olson. (*Id.* at 4a).

After the court of appeals affirmed the conviction on January 3, 2008, Mr. Alexander filed a motion asking the Court to appoint counsel to file a petition on his behalf for writ of certiorari to this Court. At first, the court of appeals denied Mr. Alexander's motion. Then, on March 17, 2008, this Court granted the petition for writ of certiorari in the case, *Melendez-Diaz v. Massachusetts*, Docket No. 07-591. On Mr. Alexander's motion for reconsideration, the court of appeals reversed itself. On March 18, 2008, the Court, citing this Court's decision to grant certiorari in *Melendez-Diaz*, granted Mr. Alexander's motion for appointment of counsel. *See* Seventh Circuit Order Granting Motion For Reconsideration In Light of *Melendez-Diaz*, attached hereto as App. B, at 10a - 11a.

REASONS FOR GRANTING THE WRIT

By granting the *Melendez-Diaz* petition, this Court has acknowledged the vastly different approaches that State and Federal courts have taken regarding the question of whether scientific laboratory reports are "testimonial" evidence under the Confrontation Clause. The court of appeals advances new theories for why the admission of laboratory reports is not problematic under the Confrontation Clause, and the factual scenario presented in this Petition - where an inadmissible laboratory report is admitted through the alleged "opinion testimony" of an expert witness (who did not perform the tests and "concur[s]" with the conclusions contained in the report) - is a foreseeable shortcut that prosecutors may use in the future to avoid the dictates of the Confrontation Clause. For the sake of comprehensive treatment of the issue, this Court should grant and set this Petition for hearing on the same date as the *Melendez-Diaz* case, or, in the alternative, hold this Petition pending a decision in that case. Further, this Petition is the proper vehicle for addressing these new arguments, because the outcome of *Melendez-Diaz* may compel a reversal or remand to the Seventh Circuit in this case.

I. The *Melendez-Diaz* Petition Established The Importance Of The Federal And State Court Controversy Over Whether Laboratory Test Results Constitute "Testimonial" Evidence Subject To Confrontation Clause Analysis.

By granting the petition for certiorari in *Melendez-Diaz*, this Court acknowledged the importance of the controversy between and among Federal and State courts over whether laboratory test results constitute "testimonial" evidence subject to the Confrontation Clause. Without the right to cross-examine the authors of laboratory reports, and without the benefit of broad discovery as under the rules of civil procedure, defendants are deprived of the opportunity - likely their only opportunity - to "cut superficially impressive scientific evidence down to its proper size." 1 Kenneth S. Broun, MCCORMICK ON EVIDENCE § 203 (6th pract. ed. 2006) (stressing the importance of "[a]ttention to possible infirmities in the collection and analysis of data.")

In 2004, this Court abandoned the substantive reliability standard of *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), in favor of a procedural interpretation of the Confrontation Clause that emphasized a criminal defendant's right to cross-examine any witnesses against him. *See Crawford v. Washington*, 541 U.S. 36, 55-56 (2004). Although reliability remained the goal, *Crawford* established that the Confrontation Clause commanded that "reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61. The Court concluded that a cross-examination requirement exists even when

there is no question about the actual reliability of the out-of-court statement, equating the procedural right to confrontation to the procedural right to a jury trial: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because defendant is obviously guilty." *Id.* at 62.

In *Crawford*, this Court declined to define the term "testimonial" specifically or comprehensively. This Court, however, did note "[v]arious formulations" of a "core class" of testimonial statements:

(1) *Ex parte* in-court testimony or its functional equivalent - affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would "reasonably expect" to be used in conjunction with a prosecution,

(2) "extrajudicial statements" contained in "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," (quotation marks omitted) and

(3) statements made "under circumstances [that] would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51-52.

In *Davis v. Washington*, 547 U.S. 813 (2006), this Court further clarified that statements are "testimonial" when circumstances "objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is

to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

When called upon to apply *Crawford* and *Davis* to scientific evidence, courts across the country have taken diametrically opposed views as to whether such evidence is "testimonial." Some courts have, for various reasons, refused to categorize laboratory reports as "testimonial" statements. *See People v. Geier*, 61 P.3d 104, 139 (Cal. 2007), *petition for cert. filed*, (U.S. Nov. 14, 2007) (No. 07-7770); *see also State v. O'Maley*, 932 A.2d 1, 11-12 (N.H. 2007), *petition for cert. filed*, (U.S. Nov. 7, 2007) (No. 07-7577); *State v. Forte*, 629 S.E.2d 137, 143-44 (N.C. 2006); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005). Other courts have concluded that laboratory reports are "testimonial" under the Confrontation Clause, and that the prosecution should present the authors of those reports for cross-examination by the accused. *See Hinojos-Mendoza v. People*, 169 P.3d 662, 666-667 (Colo. 2007) (laboratory report concluding that substance was cocaine was testimony, for purposes of defendant's right to confrontation), *petition for cert. filed*, (U.S. Feb. 4, 2008) (No. 07-9369); *Roberts v. United States*, 916 A.2d 922, 939 (D.C. 2007) (finding a violation of a defendant's right to confrontation where out-of-court statements of FBI forensic scientists through testimony of DNA expert from FBI's forensic laboratory, although violation later found harmless due to expert's independent analysis); *State v. March*, 216 S.W.3d 663, 665-666 (Mo. 2007) (noting that cases such as *Verde* "incorrectly focus on the

reliability of such reports"), *cert. dismissed*, __ S. Ct. __, 2007 WL 1825157 (Oct. 5, 2007); *State v. Caulfield*, 722 N.W.2d 304, 309-10 (Minn. 2006), *petition for cert. filed*, (U.S. Feb. 1, 2008) (No. 07-9567) (same); *see also City of Las Vegas v. Walsh*, 124 P.3d 203, 207-08 (Nev. 2005) (affidavit of registered nurse who completed blood draw testimonial). As this Court's decision to grant certiorari in *Melendez-Diaz* shows, the question presented is both important and the subject of substantial controversy.

II. This Petition Should Be Granted And Set For Hearing On The Same Date As *Melendez-Diaz* Because The Court Of Appeals Introduces Novel Arguments That Must Be Addressed To Answer Fully The Important Question Presented.

The court of appeals draws a tenuous distinction between the "testimonial" and "non-testimonial" parts of a laboratory report for the purpose of Confrontation Clause analysis. The *Melendez-Diaz* case does not present this Court with this distinction for its review. *See* Pet. for Certiorari in *Melendez-Diaz*, attached as App. C, at 12a - 16a. The *Melendez-Diaz* petition noted that courts finding that laboratory reports testing forensic evidence are not testimonial generally advanced three arguments: (1) that such reports are "akin to a business record," *see Verde*, 827 N.E.2d at 703, (2) that such reports "are neither discretionary nor based on opinion," but rather are the product of "a well-recognized scientific test," *id.* at 705, and (3) that such reports "constitute [the analyst's] contemporaneous recordation of

observable events." *Geier*, 161 P.3d at 139; *O'Maley*, 932 A.2d at 11-12.

Perhaps cognizant that these decisions "erroneously focus on the reliability of the reports and whether the reports fall within the business or public records hearsay exceptions," *see Hinojos-Mendoza*, 169 P.3d at 666, the court of appeals advanced new theories that arguably avoid such criticism. For example, the court of appeals stated that certain readouts on instruments are not "statements," and therefore cannot be "testimonial," that if the data are "statements," the only declarant would be the machines, and that it was not plain error to allow an expert witness to testify as a proxy for the original author of an unsworn, inadmissible laboratory report and to vouch for the accuracy of the work and concur with the conclusions drawn by the original author. (App. A at 3a - 6a.)

This novel analysis, however, ignores the possibility of operator bias, malfeasance, or plain incompetence. Put another way, it presumes the trustworthiness, skill, and reliability of the lab technician, Olson. *See* Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 499 (2006) (noting that, on rare occasions, lab technicians have "engage[d] in long-term, systematic, and deliberate falsification of evidence in criminal cases"). As the operator, Olson could have manipulated the machines' outputs; he could have falsified his notes or switched samples. He could have made a mistake and not known it, or attempted to hide it. At least

under the Massachusetts procedure challenged in the *Melendez-Diaz* petition, the lab technicians submit their reports with an affidavit signed under oath. Here, the Government merely had DeFrancesco vouch for Olson and his work. If the greater procedure required by Massachusetts is insufficient under the Confrontation Clause, the lesser procedure employed in this case must fail.

The assumption that laboratory results are somehow self-generating or automatic is itself a dangerous fallacy:

> The possibility of human error exists at every step in the testing process. Samples get mixed up or mislabeled. Many human beings handle the specimen as it goes through a chain of custody. One expert is concerned that '[t]he real room for error is not with the technology but with administrative error. A human being has to pick up the sample and put it in the machine. It may sound trivial but it's not. When the volume of work goes up, the error rate goes up.'

Marianne Heal, *Drug Testing in the Workplace: The Need for Quality Assurance Legislation*, 48 OHIO ST. L.J. 877, 883 (1987); *see also* U.S. Dep't of Justice, *Project Advisory Committee, Laboratory Proficiency Testing Program, Supplementary Report--Samples 6-10*, at 3 (1976) (revealing that 30% of

state forensic examiners asked to test a substance for the presence of cocaine rendered incorrect results).

The analysis of the court of appeals also oversimplifies the science behind gas chromatography mass spectrometry, insofar as it presumes that the data output of a machine is a "statement" of the machine itself, and not the operator of the machine. As the dissent noted in *United States v. Washington*, 498 F.3d 225:

> The test results, although computer-generated, were produced with the assistance and input of the technicians and must therefore be attributed to the technicians. For this reason, the majority is mistaken in concluding that "[t]he raw data generated by the diagnostic machines [or computers] are the 'statements' of the machines themselves."

Id. at 232-33 (Michael, J., dissenting).

This Petition should be granted and set for hearing on the same date as the *Melendez-Diaz* case because both cases involve the same important constitutional question as to the applicability of the Confrontation Clause to laboratory reports of forensic evidence, and because this Court should address the additional rationales accepted by the court of appeals to provide a comprehensive answer to the question presented.

III. This Petition Is The Proper Vehicle For Addressing The New Rationales Accepted By The Court Of Appeals Because The Outcome Of The *Melendez-Diaz* Case May Compel Reversal Or Remand In This Case.

Granting this Petition and setting it for hearing on the same date as *Melendez-Diaz* will clarify whether the admission of the Olson laboratory report merits a remand or even reversal in the present case. If the laboratory report contains "testimonial statements," the error of its admission is of constitutional proportion, and the constitutional test means that the Government must show that this error was harmless "beyond a reasonable doubt." *See Chapman v. California*, 386 U.S. 18, 24 (1967). For constitutional errors, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 23 (quoting *Fahy v. State of Connecticut*, 375 U.S. 85, 86-87 (1963)). By comparison, for nonconstitutional errors, the harmless-error standard requires a showing of "actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (declining to apply the more onerous *Chapman* standard to habeas petitions). "[T]he standard for harmless-error analysis in *Chapman* is considerably more onerous than the standard for nonconstitutional errors. . . ." *United States v. Lane*, 474 U.S. 438, 446 n. 9 (1986). The court of appeals, having concluded that the "raw data" contained in the (improperly) introduced laboratory report was not "testimonial," apparently applied an incorrect

standard of review for constitutional errors under *Chapman*.

The improper admission of the Olson laboratory report into evidence contributed to the conviction. *First*, the evidence, by its nature, was compelling. Studies have shown that juries are swayed by what has been dubbed the "CSI Effect," after the popular TV show where crime-scene investigators use scientific techniques to solve murders and other crimes. *See* Andrew P. Thomas, *The* CSI *Effect: Fact or Fiction*, 115 YALE L.J. POCKET PART 70 (2006), http://www.thepocketpart.org/2006/02/thomas.html. The chief prosecutor for Maricopa County, Arizona, Mr. Thomas, stated:

> Our prosecutors frequently talk to jurors after their verdicts about the cases they just decided. On the basis of these conversations with juries, 74% of our prosecutors maintained that they have prosecuted a case in which the jury "expected to be presented with scientific evidence," and that when both scientific and nonscientific evidence existed, 45% of our prosecutors felt "the jury focused so much on presented scientific evidence that they paid too little attention to unscientific evidence" like witnesses and police testimony.
>
> In one drug case, the officer saw the defendant throw down a baggie of drugs. The baggie was not fingerprinted by the time of trial because there was a backlog

> for laboratory testing that was up to six months. As Deputy County Attorney Kristen Knudsen explained: "After the trial, the jury complained that the lack of fingerprint evidence suggested that the baggie could have been there all along."

Id.

In other words, laboratory reports are superficially impressive to juries, and juries may be inclined to accept such reports uncritically. The right to cross-examine the proponent of such evidence thus becomes very important.

Second, there should have been a presumption that the admission of the laboratory reports in this case was prejudicial. Federal Rule of Evidence 703 provides that "[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Ev. 703. Moreover, "[w]hen inadmissible evidence used by an expert is admitted to illustrate and explain the expert's opinion, however, it is 'necessary for the court to instruct the jury that the [otherwise inadmissible] evidence is to be considered solely as a basis for the expert opinion and not as substantive evidence.'" *See United States v. 0.59 Acres of Land*, 109 F. 3d 1493, 1496 (7th Cir. 1997) (quoting *Paddack v. Dave Christensen, Inc.*, 745 F. 2d 1254 (9th Cir. 1984)). These rules suggest that

prejudice should have been presumed in their breach.

Third, there was actual prejudice in this case. The court of appeals' conclusion that any error in admitting the laboratory report into evidence was harmless is based on the notion that the report was merely cumulative of DeFrancesco's allegedly independent expert testimony. The Constitution, however, cannot permit an end-run around the Confrontation Clause by using expert witnesses to "summarize out-of-court statements made by others." *United States v. Lawson*, 653 F.2d 299, 302 (7th Cir. 1981). Nor should the Court permit expert witnesses to vouch for the out-of-court statements made by others and repackage them as their own independent judgment.

As the transcript repeatedly shows, DeFrancesco was not providing his own independent opinion, but was "concur[ring]" with the conclusions reached by Olson in Olson's report. (App. D, Tr. 5/112, at 31a; Tr. 5/116, at 35a-36a; Tr. 5/119, at 38a-39a; Tr. 120, at 39a-40a; Tr. 5/124-125, at 45a-46a; Tr. 5/132, at 54a-55a) The Government, perhaps realizing the inadequacy of DeFrancesco's testimony, belatedly attempted to recharacterize what he was saying, asking: "[W]hen you say you concur with [Olson's] conclusion, you're saying that [the exhibit], in your expert opinion, is cocaine hydrochloride?" (*Id.*, Tr. 5/119, at 39a). Given DeFrancesco's repeated reference to Olson's conclusions as the basis for his own, it would be impossible for anyone to discern where Olson's conclusions end and DeFrancesco's

independent judgment (if any) begins. Thus, DeFrancesco's testimony does not render harmless the admission of Olson's report into evidence.

This Petition should be granted and set for hearing on the same date as *Melendez-Diaz*, or held pending the decision in that case, because if laboratory reports prepared for the prosecution are the testimonial statements of their authors, the court of appeals must revisit the question of whether the admission of the laboratory report without first requiring the testimony (and cross-examination) of Olson was harmless beyond a reasonable doubt under the Confrontation Clause.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for writ of certiorari and set it for hearing on the same date as *Melendez-Diaz v. Massachusetts*, Docket No. 07-591, or in the alternative, hold it pending a decision in that case.

Respectfully submitted,

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April 2, 2008

APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.

GEORGE MOON and ANTHONY ALEXANDER,
Defendants-Appellants.

No. 2:04-CR-71-Rudy Lozano, Judge.

Argued September 13, 2007
Decided January 3, 2008

Before EASTERBROOK, Chief Judge, and CUDAHY and SYKES, Circuit Judges.

EASTERBROOK, Chief Judge.

Anthony Alexander and George Moon have been convicted of distributing cocaine and of some ancillary crimes. *See* 21 U.S.C. §841. Alexander received a sentence of life imprisonment and Moon of 190 months. The principal question on appeal is whether a chemist violated the Confrontation Clause of the Sixth Amendment when testifying that the substance seized from defendants was cocaine.

James DeFrancesco, a chemist employed by the Drug Enforcement Agency, testified that the substance was cocaine. He based this conclusion on the output of two machines: an infrared spectrometer and a gas

chromatograph. DeFrancesco did not perform the tests himself, the lab work had been done by Ragnar Olson, a chemist who left federal employment three weeks before trial. Olson had just started at law school and did not want to interrupt his legal education. So DeFrancesco testified, using the instruments' output, a report that Olson had prepared, and Olson's lab notes (which persuaded DeFrancesco that Olson had prepared the samples and run the tests correctly). Defendants did not object to DeFrancesco's testimony, or the introduction into evidence of Olson's report, other than on the ground that the tested samples' chain of custody was faulty. On appeal, however, they abandon the chain-of-custody point and contend that using Olson's work in any way violates the Confrontation Clause. The lack of an objection means that appellate review is limited to plain error.

Crawford v. Washington, 541 U.S. 36 (2004), holds that the Confrontation Clause entitles defendants in criminal cases to block the use of testimonial statements by persons who are not available for cross-examination at trial. Phrasing *Crawford's* rule as an entitlement, rather than an unconditional command to the court, is important. Hearsay usually is weaker than live testimony, and defendants may prefer the hearsay version rather than making an objection that would compel the prosecution to produce a stronger witness. If a confrontation-clause objection had been made and granted in this case, for example, the result would have been the appearance of Olson on the stand, and then defendants would have been worse off than they were with DeFrancesco for defense counsel could

undermine DeFrancesco's testimony by reminding the jury that he had not done any of the work and that flaws in Olson's procedures may have been omitted from the lab notes. That it may be to defendants' advantage to accept the hearsay version of evidence makes it problematic to entertain a *Crawford* claim via the plain-error clause of Fed. R. Evid. 103(d). A defendant who sincerely wants live testimony should make the demand, so that the declarant can be produced. The lack of a demand for testimony by an available declarant leads to the conclusion that the appellate argument is strategic rather than sincere.

We need not pursue that subject, however, because there was no problem with DeFrancesco's testimony. He testified as an expert, not as a fact witness. When an expert testifies, "the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." Fed. R. Evid. 703. So if the Confrontation Clause precludes admitting Olson's report, this does not spoil DeFrancesco's testimony. *See United States v. Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007). (Litigants may insist that the data underlying an expert's testimony be admitted, *see* Fed. R. Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause.)

Because defendants failed to make the right objection, Olson's report was received in evidence. And some of his report is indeed testimonial in nature. The report has two kinds of information: the readings taken from the instruments, and Olson's conclusion that these readings mean that the tested

substance was cocaine. The latter is testimonial as the Supreme Court used that word in Crawford and more recent decisions, such as *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266 (2006). Davis says that a statement is testimonial if it was made without an ongoing emergency, and "the primary purpose of the interrogation [or statement] is to establish or prove past events potentially relevant to later criminal prosecution." 126 S. Ct. at 2274 (footnote omitted). A chemist's assertion that "this substance was cocaine" meets the Davis definition.

DeFrancesco reached on the stand the same conclusion that appeared in Olson's report. Defendants do not say that Olson's evaluation could have played any role in the jury's deliberation. Instead they are concerned about the readings taken from the instruments, because those readings are the problem for the defense. Any competent chemist would infer from these data that the tested substance was cocaine. Yet the instruments' readouts are not "statements", so it does not matter whether they are "testimonial." That's the holding of *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007).

A physician may order a blood test for a patient and infer from the levels of sugar and insulin that the patient has diabetes. The physician's diagnosis is testimonial, but the lab's raw results are not, because data are not "statements" in any useful sense. Nor is a machine a "witness against" anyone. If the readings are "statements" by a "witness against" the defendants, then the machine must be the declarant. Yet how could one cross-examine a

gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests. That is one reason why Rule 703 provides that the expert's source materials need not be introduced or even admissible in evidence. The vital questions–was the lab work done properly? what do the readings mean? –-can be put to the expert on the stand. The background data need not be presented to the jury.

Thus we agree with *Washington* that the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself. Our decision in *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006), is to much the same effect-though it does not involve expert analysis. A hospital conducted blood and urine tests that were introduced into evidence as the hospital's business records. *See* Fed. R. Evid. 803(6); see also Rule 803(4). Then the arresting officer testified that the results demonstrated the presence of methamphetamine in Ellis's system. Ellis holds that the test results were not "testimonial" under Crawford and Davis. 460 F.3d at 923-24. We did not consider the possibility that the data are not "statements" in the first place. Thus Washington and Ellis reach the same result: the Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation of those data may be testimonial.

DeFrancesco was entitled to analyze the data that Olson had obtained. Olson's own conclusions based on the data should have been kept out of evidence (as doubtless they would have been, had defendants objected). Still, given DeFrancesco's live testimony

and availability for cross-examination, Olson's inferences and conclusions were not harmful to the defendants.

Defendants raise many other issues, but the only one that requires discussion is whether the evidence supports the jury's verdict that Alexander and Moon conspired to distribute cocaine. They depict their transactions as those of commercial buyer and seller, rather than as a conspiracy, which means an agreement to commit a future crime. *See United States v. Lechuga*, 994 F.2d 346 (7th Cir. 1993) (en banc). Why this issue should arise at all is hard to understand. Both defendants were convicted of actually distributing cocaine. The penalty for conspiracy to distribute drugs is no greater than the penalty for a substantive offense and may be less. (Alexander was sentenced to life in prison for one of his substantive offenses, and to 120 months for another, to run concurrently with 120 months for the inchoate crime; Moon received 190 months, concurrent, for both substantive and inchoate offenses. Alexander's sentence is higher because of his extensive criminal history, use of a weapon, and obstruction of justice; none of those enhancements is contested.)

Adding a conspiracy charge does little but complicate the trial and appeal. Some prosecutors may believe that they need to charge conspiracy in order to take advantage of the co-conspirator exception to the hearsay rule, see Fed. R. Fvid. 801(d)(2)(E), but that's a mistake. This rule of evidence depends on principles of agency, so it applies (if the evidence demonstrates agreement by a preponderance, *see*

United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir. 1990) (en banc)) whether or not the indictment has a conspiracy count. *See United States v. Gil*, 602 F.2d 546, 549 (7th Cir. 1979). Only the $100 special assessment for the conspiracy conviction is at issue, and it is hard to imagine that the prosecutor charged, tried, and briefed appeals on this issue for less than $200 (one assessment per defendant). The value of judicial time devoted to this question greatly exceeds $200. But here we are, and after *Ray v. United States*, 481 U.S. 736 (1987), a court of appeals can't use the concurrent-sentence doctrine to bypass the issue.

A judge authorized a wiretap of Alexander's phone so that agents could track down the source of the drugs he was selling. (They had lots of evidence that Alexander was dealing in cocaine and marijuana.) Agents heard Alexander talk to Moon, and the familiarity with which they spoke implied that they had been doing business for some time. During one conversation Moon said: "what I intend to do is to give you enough to have four, five, or six meals if that's open for you and then when I come back the following to see you is that you and I need to schedule some time to have some lunch." An agent interpreted this for the jury as a promise to deliver between 4 and 6 kilograms of cocaine ("meals"), with some or all of the payment deferred (so that "schedule some time to have some lunch" meant "set up a time for you to pay me"). The district judge did not abuse his discretion in allowing the agent to testify as an expert about the meaning of elliptical phrases that are designed to make conversations sound innocent to any third party who may be

listening; Moon was not running a Meals-on-Wheels service.

When agents stopped a car that Moon was driving, they found 28 packages of cocaine, each holding a kilogram, and about $60,000 in cash, some $6,000 of which could be traced to payments that an informant had made to Alexander. Moon later called Alexander and tried to set up a time for Alexander to pay the rest of what he owed. A jury could conclude from this (and the references to "lunch") that Moon had been fronting cocaine to Alexander, who paid for some or all of each delivery only after reselling the inventory. The agents kept a watch on Alexander and Moon, who soon met; Alexander handed over $20,000. (A jury could find that the money came from Alexander, who was seen giving Moon something before driving away.)

Defendants acknowledge that they dealt in cocaine but say that buying and selling drugs differs from conspiracy. That's true enough in principle, as Lechuga holds, but often the same evidence that shows particular transactions may support an inference that the parties have agreed to commit future crimes together, and thus have conspired. *See United States v. Nubuor*, 274 F.3d 435 (7th Cir. 2001); *United States v. Hach*, 162 F.3d 937 (7th Cir. 1998). That's so here–not only because the recorded conversations imply that Alexander and Moon had been working together but also because a jury could infer that Moon ex ended credit to Alexander. Credit transactions make the parties co-venturers; Moon would profit only if Alexander committed a future crime (the sale of the fronted drugs) and paid

him back. The jurors were told that they had to distinguish normal sales from conspiracy; defendants do not question the terms of those instructions. The evidence was sufficient to allow a reasonable jury to infer that Moon and Alexander were joint venturers.

AFFIRMED

A true Copy:
Teste:

/s/
Clerk of the United States Court of Appeals, Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,
No. 06-1840
v.
ANTHONY ALEXANDER, Defendant-Appellee.

No. 04 CR 71

Rudy Lozano, Judge.

Before FRANK H. EASTERBROOK, Chief Judge

MOTION FOR RECONSIDERATION OF MOTION TO APPOINT COUNSEL TO PREPARE PETITION FOR WRIT OF CERTIORARI FOR APPELLANT,

Filed March 14, 2008

In light of the Supreme Court's decision to grant certiorari in *Melendez-Diaz v. Massachusetts*, No. 07-591 (Mar. 17, 2008), which presents a question related to one of the issues in this appeal, the court concludes that Alexander should have the benefit of counsel to consider filing a petition for certiorari. The motion to reconsider is accordingly granted, and counsel will be appointed under the Criminal Justice Act.

Alexander must understand, however, that the appointment of counsel differs from an entitlement to have counsel file a petition for certiorari. Review by the Supreme Court is discretionary. Counsel

must use his best professional judgment to decide whether the probability of that the Supreme Court will decide to hear Alexander's case is sufficiently high to justify a petition.

APPENDIX C

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Luis E. Melendez-Diaz, Petitioner,
v.
Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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October 26, 2007

* * * *

2. None of the three rationales that the Massachusetts Supreme Judicial Court and other courts have invoked to characterize forensic examiners' laboratory reports as nontestimonial

provide any reason to retreat from this straightforward application of the Confrontation Clause.

a. The Massachusetts Supreme Judicial Court held that forensic reports identifying controlled substances are not testimonial in part based on the supposed reliability of such scientific tests, reasoning that they are "neither discretionary nor based on opinion." *Verde*, 827 N.E.2d at 705, App. 16a; *see also Dedman*, 102 P.3d at 636 (finding forensic reports nontestimonial because "the process (of their creation] is routine, non-adversarial, and made to ensure an accurate measurement"); *Forte*, 629 S.E.2d at 143 (same). This is nothing more than *Roberts redux*. Even if these courts' assessment of the reliability of forensic testing were correct, but *see supra* at 16-17, this Court expressly rejected such legal reasoning in *Crawford*. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S. at 62. Defendants have a right to insist that prosecutorial testimony be presented through the adversarial process, regardless of whether judges surmise that cross-examination would likely bear fruit.

b. Nor does *Crawford's* reference to business records support deeming forensic reports nontestimonial. The common law "shop book rule" exception for regularly kept business records, to *which Crawford* adverted, see 541 U.S. at 56, did not remotely encompass reports generated for prosecutorial use. *See Palmer v. Hoffman*, 318 U.S.

109, 113-14 (1943) (explaining that records "calculated for use essentially in the court" or whose "primary utility is in litigating" fall outside of common law rule, and declining to expand federal exception to allow their admission); *State v. Miller*, 144 P.3d 1052, 1058-60 (Or. Ct. App. 2006) (tracing history of business records exception and concluding that state crime laboratory reports fall outside historical exception). Even as recently as the 1970s, the drafters of the Federal Rules of Evidence declined to expand the "public records" exception in criminal cases to include "matters observed by police officers and other law enforcement personnel" and "factual findings resulting from an investigation." Fed. R. Evid. 803(8). They took this action "in view of the almost certain collision with confrontation rights which would result from [such records'] use against the accused in a criminal case." Advisory Committee's Notes, Note to Paragraph (8) of Rule 803, 56 F.R.D. 313 (1972). *See generally United States v. Oates*, 560 F.2d 45, 68-73 (2nd Cir. 1977).

It makes no difference that some jurisdictions, such as Massachusetts, have since decided to characterize laboratory reports as "akin to business records, 827 N.E.2d at 702, App. 12a, or that others have gone so far as to expand their statutory definitions of business records expressly to include state crime laboratory reports. As this Court emphasized in *Crawford*, the reasons for subjecting testimonial statements to confrontation procedures "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." 541 U.S. at 56 n.7. In other words,

"*ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." *Id.* at 51. Accordingly, jurisdictions may no more insulate state crime laboratory reports from confrontation scrutiny by labeling them business records as they could by giving the same label to transcripts of custodial interrogations, which, after all, police conduct in their ordinary course of business.

c. Finally, this Court's decision in *Davis* does not support courts' attempts to classify laboratory reports as nontestimonial on the ground that they are "contemporaneous recordation[s] of observable events." *Geier*, 161 P.3d at 139. *Davis* involved a drastically different scenario than is at issue here-namely, a crime victim calling 911 in the midst of an ongoing emergency. To the extent that timing matters in that context, *Davis* holds that a declarant's statements are nontestimonial when they narrate threatening, criminal events while they are actually happening. Nothing in that decision suggests that a state official's formalized description of evidence that police seized days or weeks before is not testimonial, especially when the forensic report's express purpose is to build a case for prosecution.

The crux of *Davis*, like *Crawford* before it, is that statements gathered for "the primary, if not indeed the sole, purpose of ... investigat[ing]" a past crime are testimonial. *Davis*, 126 S. Ct. at 2278; see also *id.* at 2273-74; *Crawford*, 541 U.S. at 53 (statements obtained by police officers serving an "investigative and prosecutorial function" are testimonial). That is

the undeniable purpose of sworn forensic reports. This Court should not wait any longer to make clear that the Confrontation Clause applies to such evidence.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,	) DOCKET NO.:
	) 2:04-CR-71 RL
PLAINTIFF,	) APPEAL NO.:
	)
VS.	) THURSDAY,
	) FEBRUARY 24,
	) 2005
GEORGE MOON AND	) 12:00 P.M.
ANTHONY ALEXANDER,	)
	) JURY TRIAL
DEFENDANTS.	) VOL. 5, PGS. 1-212

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUDY LOZANO
U.S. DISTRICT COURT JUDGE
AND A JURY

APPEARANCES:

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For Defendant Alexander: Anthony Alexander, Pro Se

For Defendant Alexander as Standby Counsel:	Charles E. Stewart, Jr. 8396 Mississippi St., Ste. G Merrillville, IN 46410 (219) 736-5555
For Defendant Moon:	Mr. Jerry T. Jarrett, Esq. Robert L. Lewis & Associates 2148 W. 11th Avenue Gary, Indiana 46404 (219) 944-2755

* * * *

Tr. 5/97

Q. In order to prepare for testifying in this trial, what, if anything, could be done?

A. I reviewed his paperwork. I reviewed his data and made sure that all of his conclusions were supported by the data. Mine were not the first set of eyeballs on his work. It's checked at many levels. And I have full confidence in his ability to carry out his assignment.

So I had no reason to believe that his work was not going to be righteous. In my opinion, he did just fine.

Q. Did you look just at his lab results, or did you also look at his notes?

A. The notes and the data, yes, I did.

MR. NOZICK: May I approach the witness, Judge?

THE COURT: You may.

MR. NOZICK: Yes, sir, would you like some water?

BY MR. NOZICK:

Q. Are you okay, sir?

A. Sure.

Q. I'm handing you what's been marked as Government's Exhibit 1, three pounds -- strike that -- Government's Exhibit 1.

Do you recognize that exhibit?

A. Yes, I do.

Q. How is it that you recognize that?

A. I recognize it by the seals and Mr. Olson's signature in

Tr. 5/98

at least one location.

Q. Do you see the DEA lab number on that?

A. Yes, I do.

Q. Is that 157569?

A. That's correct.

Q. Do you see Mr. Olson's name on it?

A. Yes, I do.

Q. Is there a date on that, the date he would have opened that and tested that?

A. The date opened was June 9th of 2004.

Q. Now, by looking at the exhibit, can you tell when and where this would have been received into the lab, or just the

date that it's tested?
A. Received into the laboratory -- the information is
typically not on the evidence itself. I would have to take a
look at additional paperwork.
Q. But you know the date that it was opened and tested?
A. Yes.
Q. Now, did Mr. Olson make notes for this, or just write
down the lab report?
A. There were handwritten notes.
Q. Now, is that typical to make handwritten notes when
you're testing an item?
A. It's required.
Q. It is required. So any time you test an item, you make

Tr. 5/99

handwritten notes on it?
A. We have to handwrite all our notes.
Q. Have you had an opportunity to review Mr. Olson's notes?
A. Yes, I have.
Q. Could you tell from the notes what the condition of that
drug exhibit, Government's Exhibit 1, was when Mr. Olson first
received it?
A. Yes.
Q. What is that condition?

A. If I could refer to the notes. It came in one heat-sealed evidence envelope like this, and there were three packages within here, each of them plastic containers -- or plastic pouches.

Q. And can you tell from the notes if there had been any signs that he marked down that the contents of the exhibit were tampered with or altered before he received the exhibit?

A. No. There was a -- I have witnessed the description, and -- which meant that there may have been some minor difference in the description on the paperwork -- on the incoming paperwork and mine. But without that paperwork in front of me, I don't know what the nature of that discrepancy might have been.

Q. Can you tell from the notes what you first did with the exhibit?

The first thing he did, as I would do, is to weigh the

Tr. 5/100

exhibit and check the gross weight, the entire weight of the

packaging, the green plant material and everything together.
And check that against the original DEA 7 Form, which has a
gross weight on it.
Q. Sometimes are there small inconsistencies between the
weight when you weigh it, and the weight when the DEA agents
weigh it?
A. Sure.
Q. Is that a yes?
A. Yes.
Q. Are those DEA agents scientists, to your knowledge?
A. No.
Q. And did he open that package?
A. Yes, he did.
Q. Did he perform any tests on that package of the suspect
marijuana?
A. He performed several tests.
Q. Can you please briefly explain what these tests are to
the jury?
A. When materials like this come in in multiple packages,
what we have to do is we have to screen the packages -- the
contents of the packages to find out if they're essentially the
same material. And then once we establish that they are the
same, then we join them together and form a composite and then

25 continue our testing from there. And that's what Mr. Olson

Tr. 5/101

1 did.
2 Q. Are there certain names of actual tests that you would do
3 on marijuana?
4 A. Sure. The first test he performed was called a modified
5 Ducanoid and Levine. (ph)
6 Q. Now, can you put that in laymen's terms what that entails
7 without making it too sciencey?
8 A. Well, I think Ducanoid and Levin were probably the two
9 scientists who came up with the test. And it's a color test.
10 And what it does is it will turn a solution blue, if it's a
11 positive blue or purple, if it's a positive. And in this case,
12 it did and it was positive for all three bags.
13 Q. Okay. And are there any other tests that would have been
14 performed on this one?
15 A. It also appears that on each of them he performed a
16 microscopic test where you just simply take the plant material
17 and look at it under the microscope, and look to identify
18 certain features of the plant.

And something like marijuana has very unusual features, unique features. And that's what he identified, those features. And so that would have been a positive for his conclusion.

Q. And are there any other tests that were done on the marijuana?

A. Then at that point until the screening -- he was

Tr. 5/102

satisfied with the screening, indicated that all three were the same, he would combine the three together and form a composite and then do a confirmatory test on top of that. And that one identified a controlled substance within marijuana that is quite typical of marijuana itself. That's called Delta 9 THC.

Q. Is that actually Cannabis or marijuana, or is it a different drug?

A. It's a drug that is produced by the marijuana plant. And it's one of the most active components in the marijuana.

Q. And that's a controlled substance under the Controlled Substance Act?

A. It's a controlled substance all by itself. But then marijuana is also a controlled substance.
Q. What schedule controlled substance is marijuana?
A. Marijuana is a Schedule I Controlled Substance.
Q. Now, these tests that were performed on Government's 1, are those the standard tests that would be performed in your lab on suspect marijuana?
A. Yes.
Q. Are those the same tests that you had performed on that marijuana -- suspect marijuana, if you had conducted them yourself?
A. Yes.
Q. Can you tell from the notes and/or the lab report what the results were on the tests on Government's Exhibit 1?

Tr. 5/103

A. That the results were positive for marijuana. And so the conclusion was marijuana.
Q. And was the substance weighed?
A. Yes.
Q. What was the weight?
A. The net weight of the plant material within all the packaging was 1,326 grams.

Q. Are you good with math between pounds and grams?
A. Not bad.
Q. Roughly, how many pounds is that?
A. One pound is 455 grams, so you're looking at approximately three pounds.
Q. So Mr. Olson, he was able to form an expert opinion as to the contents of that exhibit?
A. Yes.
Q. What was his expert opinion again?
A. That it was marijuana.
Q. Now, after reviewing his notes and the procedures he took and the lab report, are you able to form an expert opinion as to the contents of Exhibit 1?
A. Yes.
Q. And what is your expert opinion?
A. I concur with his in that it was marijuana.
Q. And on what do you base that opinion?
A. On the data that he acquired and his handwritten notes,

Tr. 5/104

and on just my visual observations of the material itself.
Q. Okay. After his analysis, do you know what he did with this exhibit?
A. He packaged it back up and turned it back into the main

vault.
Q. Okay. And you have that in front of you today. Do you
see Mr. Olson's initials still on it?
A. The evidence itself?
Q. Yes.
A. Yes.
MR. NOZICK: At this point the government would move
to introduce what's been marked as Government's Exhibit 1.
THE COURT: Any Objection?
MR. JARRETT: None by Defendant Moon.
DEFENDANT ALEXANDER: None.
THE COURT: It's admitted.
(Government's Exhibit 1 received in evidence.)

* * * *

Tr. 5/109

THE COURT: Mr. Nozick, you may continue with your
examination.
MR. NOZICK: Thank you, your Honor. May I approach
the witness again?
THE COURT: You may.
DIRECT EXAMINATION (CONTINUED)
BY MR. NOZICK:
Q. Mr. DeFrancesco, I'm handing you what has been marked as
Government's Exhibit 3. Do you recognize that?
A. Yes, I do.
Q. What is that exhibit?

Tr. 5/110

A. This is as it came into our laboratory, Exhibit No. 21, it's now marked Government's Exhibit 3, and it has a unique laboratory number to it.

Q. And does it have your DEA lab number 157744 on it?

A. That's correct.

Q. That's a different lab number than the other items that we've looked at, is that correct?

A. Yes.

Q. They each have their own lab number, is that accurate?

A. That's correct.

Q. Can you tell by looking at the exhibit when and where Mr. Olson received it?

A. He received the exhibit -- I'd have to take a look at his paperwork -- he received the exhibit on June 21st of 2004.

Q. Have you had the chance to look at his notes for this exhibit?

A. Yes.

Q. Can you tell from the notes the condition of the drug exhibit when he received it?

A. The condition of the drug exhibit was one heat-sealed envelope containing a clear Ziploc bag, containing a clear

22 unknotted Ziploc bag, containing a white powder substance.
23 Q. Could you tell from his notes if there were any signs
24 that this exhibit had been tampered with before he received it?
25 A. None, the seals were intact.

Tr. 5/111

1 Q. Could you tell from his notes what he did with this
2 exhibit?
3 A. As in the previous exhibit, he had taken a gross weight
4 of the package, compared it to the gross weight on the DEA 7,
5 and then proceeded with his analysis.
6 Q. Now, this piece of evidence, this suspect marijuana,
7 which we now know as marijuana and this suspect cocaine, are
8 the same tests done on it?
9 A. Not exactly the same tests. The first few tests -- or
10 actually it looks like two tests were run on this. The first
11 test is different than what you would run on the marijuana.
12 Q. Okay. What are the tests that were run on this cocaine?
13 A. The two tests that were run on here, the first one is
14 known as IR, which is infrared spectrophotometry. And that was

used to do an initial identification. And then a second confirmatory test as was done with the prior exhibit was known as -- is known as GCMS, which stands for gas chromatography mass spectrometry.

Q. Are these the standard tests that are performed in your lab to determine the chemical analysis in the exhibit?

A. Yes, indeed.

Q. And these tests that Mr. Olson performed on this exhibit, are these the same ones that you would have done, if you were the initial chemist?

A. Most definitely.

Tr. 5/112

Q. Could you tell from the notes or the lab report, what were the results of the test?

A. The results were cocaine hydrochloride and caffeine.

Q. Now, when you say cocaine hydrochloride, what does that mean?

A. It's more commonly known as powder cocaine.

Q. And was the substance weighed?

A. Yes.

Q. What was the weight of it?

A. The net weight of the substance was 125.0 grams.
Q. Now, when you say net weight, is that without packaging?
A. That's correct.
Q. Now, was Mr. Olson able to form an expert opinion as to what the contents of this exhibit were?
A. Again, cocaine hydrochloride and caffeine.
Q. Were you able to form an expert opinion as to the contents of this exhibit?
A. As I did before after reviewing his paperwork, I concur.
Q. Okay. So your expert opinion is also that this is powder cocaine or cocaine hydrochloride?
A. Based on his results, yes.
Q. After it was analyzed, do you know what he did with the exhibit?
A. Packaged it up as in the prior exhibit and returned it to the main vault.

Tr. 5/113

Q. Okay.
A. And submitted his report.
Q. Does he reseal it first?
A. Reseals it, yes.
Q. Does he initial it?
A. Yes.
Q. Do you see his initials on it?

A. Yes, I do.
Q. And his seal?
A. Yes. Well, let me back up a little bit. When the evidence comes in, typically it will have just one seal at the top, and have three factory seals. And then when the chemist opens it up, we maintain the agent's seal on the top and we cut at the bottom so that when the evidence is done with the chemist, you'll see two seals, a seal at the top and a seal at the bottom. And we even maintain the strip that we used to cut -- that we cut off. And that strip is inside here, it's between some of the bags.
Q. Okay.
MR. NOZICK: At this time the government will move into evidence what's been marked as Exhibit 3.
THE COURT: Any objection?
MR. JARRETT: No, your Honor.
DEFENDANT ALEXANDER: No.
THE COURT: It's admitted.

Tr. 5/114

(Government's Exhibit 3 received in evidence.)
MR. NOZICK: May I approach the witness?
THE COURT: You may.

BY MR. NOZICK:

Q. Mr. DeFrancesco, I'm handing you what's been marked as Government's Exhibit 4. Do you recognize that exhibit?

A. Yes, I do.

Q. What is that exhibit?

A. This is as it came into the laboratory, Exhibit Number 22, it's now Government's Exhibit 4, and it has the laboratory number 157962.

Q. Have you had the chance to look at that exhibit before today?

A. Yes, I did.

Q. And by looking at the exhibit, can you tell when and where Mr. Olson received it?

A. Again, referring back to his paperwork, he received it on July 7th of 2004.

Q. Did Mr. Olson also do notes for this case, in addition to his lab report?

A. As he did with the previous, yes.

Q. Have you had the opportunity to review his notes for this exhibit?

A. Yes, I did.

Q. Could you briefly tell the jury what the tests were --

strike that. Did he perform the same tests on this as he performed on the last exhibit, which was also suspect cocaine?

A. He performed the same two tests as the prior exhibit. However, he also performed a screening test, which is a color test somewhat similar to the test that was performed on the very first exhibit that was the suspect marijuana where a solution will go from one color to another, if it's positive for, in this case, cocaine.

Q. Can you tell from his notes what his expert opinion was and his lab report what his expert opinion was as to what Government 4 consists of?

A. That it contained cocaine base at a purity of 60 percent.

Q. Now, when you say cocaine base, does that have a street name of crack cocaine?

A. Yes, it can.

Q. So the test results for cocaine base, are they different from the test results for cocaine hydrochloride? Or -- if I could rephrase that? Could you tell from your tests whether something is powder cocaine or crack cocaine?

A. In the laboratory we can identify what we determine as the salt form. So cocaine base is the parent compound, and cocaine hydrochloride is the salt form of cocaine.

Q. And does that Exhibit 4 have a slightly different appearance than the powder cocaine we've seen previously?

A. Yes.

Tr. 5/116

Q. And how is the appearance of it different?

A. It's fairly typical of cocaine base. Sometimes it can come in as lily white. This is on the tannish side. It's chunky and looks like it's still wet, which would account for the fact that the purity is only 60 percent. Probably a good deal of the rest of the purity is devoted to water. And it comes in just small, small sort of chunks.

Q. After looking at Mr. Olson's notes and lab reports, are you, yourself, able to form an expert opinion as to the contents of Exhibit 4?

A. Yes.

Q. What is your opinion as to the contents?

A. I concur with Mr. Olson that it was cocaine base.
Q. So your opinion is that -- your expert opinion is that's
crack cocaine or cocaine base in Government's 4?
A. That it's cocaine base, correct.
Q. And after he analyzed it, did he reseal it?
A. He resealed it as he did the previous ones, placing his
seal on the bottom, so you see the agent's seal and his seal.
And then all of his packaging with it.
MR. NOZICK: At this point the government will move
into evidence what's been marked as Government's Exhibit 4.
THE COURT: Any objection?
MR. JARRETT: None, your Honor.
DEFENDANT ALEXANDER: None.

Tr. 5/117

THE COURT: It's admitted.
(Government's Exhibit 4 received in evidence.)
BY MR. NOZICK:
Q. Just to clarify, could you tell what the weight was of
that last exhibit?
THE COURT: You're talking about Government's Exhibit
4?
MR. NOZICK: Government's Exhibit 4, correct.

THE WITNESS: For Government's Exhibit 4, the net weight was 124.7 grams.

BY MR. NOZICK:

Q. Okay. And you said that your expert opinion is that that is cocaine base. Is that commonly known as crack cocaine?

A. Cocaine base can be known as crack cocaine, and crack cocaine is cocaine base typically in a chunky form. So that's consistent.

Q. Thank you.

MR. NOZICK: May I approach again, Judge?

THE COURT: You may.

BY MR. NOZICK:

Q. I'm handing you Government's Exhibit 5 -- or I handed it to you already. Do you recognize that?

A. Yes, I do.

Q. Does that have the DEA lab number on it of 158070?

A. Yes, it does.

Tr. 5/118

Q. Does it have Mr. Olson's notes on it or his name on it?

A. It has his seal at the bottom.

Q. And his name or initials or signature?

A. His name and the other information for the case.

Q. Have you had the opportunity to look at his notes for that item?
A. Yes, I have.
Q. Did he conduct the same tests on that as he did on the other cocaine exhibits?
A. Yes, he did. Pretty much identical to the previous exhibit, Government's 4.
Q. Okay. And have you had the opportunity to look at his lab report and his notes?
A. Yes, I have.
Q. And can you tell the jury, did he form an expert opinion as to the contents of Government's Exhibit 5?
A. Yes.
Q. What was that opinion?
A. That opinion was that it contained cocaine hydrochloride or powder cocaine, and then also procaine hydrochloride. And the cocaine hydrochloride purity was 16 percent.
Q. The cocaine purity was 16 percent?
A. Cocaine hydrochloride was 16 percent, correct.
Q. Was that item weighed?
A. Yes, the net weight was 238.7 grams.

Tr. 5/119

Q. After looking at the lab report and Mr. Olson's notes,

were you, yourself, able to form an expert opinion as to the contents of the exhibit that's now in front of you, Government's 5?

A. Yes.

Q. And what was your expert opinion?

A. I concur with his conclusion.

Q. Now, when you say you concur with his conclusion, you're saying that Government 5, in your expert opinion, is cocaine hydrochloride?

A. Yes.

Q. After he analyzed it, did he seal it?

A. He resealed it as he did the previous exhibits, and then submitted it back to the main vault.

MR. NOZICK: At this point the government will move into evidence what's been marked as Government's Exhibit 5.

THE COURT: Any objection?

MR. JARRETT: None, your Honor.

DEFENDANT ALEXANDER: No.

THE COURT: It's admitted.

(Government's Exhibit 5 received in evidence.)

MR. NOZICK: May I approach again?

THE COURT: You may.

BY MR. NOZICK:

Q. I'm handing you what's been marked as Government's

Exhibit 6. Do you recognize that, sir?
A. Yes, I do.
Q. Does that have a DEA lab number 159059 on it?
A. Yes, it does.
Q. Do you see Mr. Olson's name on it?
A. I see his name on the seal at the bottom.
Q. Do you see the date that he would have analyzed it?
A. The date opened was 9-8-2004 and the date sealed
9-9-2004.
Q. What tests were performed on that, if any?
A. Essentially the same tests as the previous exhibit.
However, the color test was eliminated because there was only
one container, so there was no screening to be done. It was
two confirmatory tests.
Q. Can you tell from his notes and lab reports the results
of the test?
A. The result is that it is cocaine hydrochloride at a
purity of 25 percent.
Q. Twenty-five percent, you say?
A. Twenty-five percent.
Q. And what's the weight of it?
A. The net weight 492.9 grams.
Q. Were you able to form an expert opinion as to what
Government's Exhibit 6 contains?

25 A. Once again, I concur with Mr. Olson that it's cocaine

Tr. 5/121

1 hydrochloride. If I could back up a little bit, this one also
2 contained two other components. It contained lidocaine and
3 procaine.
4 Q. Are those what you would refer to as cutting agents?
5 A. Yes. They're cutting agents, they're more appropriately
6 adulterants. There's a difference between an adulterant and a
7 dilutant. An adulterant is sort of a co-drug that's added to a
8 main drug, and the drug somewhat mimics the effect of the main
9 drug and somewhat enhances it. And so lidocaine and procaine
10 are very typical adulterants for cocaine. A cutting agent
11 would be something like starch or something extremely cheap,
12 just to bulk up the material and to essentially make a
13 controlled substance stretch out a little bit further.
14 Q. Did he reseal that after testing it?
15 A. Yes, he did. And sealed it as he did the previous
16 exhibits.

Q. Okay. And do you see his name or his initials on it?
A. Yes, I do, on the bottom.
MR. NOZICK: At this point the government will move what's been marked as Government's Exhibit 6 into evidence.
THE COURT: Any objection?
MR. JARRETT: None, your Honor.
DEFENDANT ALEXANDER: None.
THE COURT: It's admitted.
(Government's Exhibit 6 received in evidence.)

Tr. 5/122

BY MR. NOZICK:
Q. I'm handing you what's been marked as Government's Exhibit 8, and Government' s 7, and Government' s 9, Government' s 9-A, and Governments 9-B.
Do you recognize those exhibits?
(Brief pause.)
A. Yes, I do.
Q. What are those exhibits?
A. These are exhibits, DEA Exhibits 29.01, 29.02, and Exhibit 30 with laboratory numbers 159060 and 061, respectively.
Q. And did you have the opportunity to look at Mr. Olson's notes for these exhibits?
A. Yes, I have.

Q. And have you had the opportunity to look at his lab reports for those exhibits?
A. Yes.
Q. Which one would you like to discuss first.
A. Let's go in order and start with 29.
Q. What's the lab number for that?
A. That would be 159060.
Q. And what is the Government's Exhibit for that one?
A. It was actually -- it came into the laboratory as one exhibit, Exhibit 29, which was a total of 15 kilo packages that were eventually identified as cocaine. It was split into two

Tr. 5/123

separate exhibits, 29.01 and 29.02, due to the screening and the difference in chemical composition of four of those kilos versus the remaining 21.
Q. Okay. And do you see those in front of you with 159060 in two parts, 159060 and the other 159060?
A. That would be these three boxes.
Q. Now, when you say these three boxes, is that Government's Exhibit 8, 7, and 9?
A. That appears to be correct.
Q. Okay. And one of them, the first one on the lab report,

which one -- can you identify which of those roughly 21 kilos are in which box?

A. May I stand up?

THE COURT: You may.

A. I have to pull out the bags and separate out the core from the 21.

Q. Would that take a long period of time, or no?

A. I just need a place to put them.

Q. Would they fit on your desk in front of you, or no?

A. Probably not.

Q. Okay. Well, let's leave those in there for now. The first item that was tested, did Mr. Olson -- that's 159060, did he test actually all of the items under 159060?

A. Yes, he did.

Q. And have you had an opportunity to look at his notes?

Tr. 5/124

A. Yes, I did.

Q. Which tests did he perform on 159060?

A. He performed the GCMS test on all 25 kilos, kilo packages.

Q. So each individual kilo package was tested?

A. Was screened, correct.

Q. Is that DEA lab policy?

A. It's actually beyond policy. He was a pretty thorough chemist.

Q. When you say that all those kilos were tested, which tests were done on that cocaine or suspect cocaine?

A. Well, he performed the screening test on all 25. And then segregated the packages according to his results. And, again, he separated four from the other 21. and the 21 he designated as 29.01, DEA Exhibit 29.01, and the then the other four were 29.02.

Q. Let's talk about 29.01 first. Which test did he perform on those?

A. The same as the previous two or three exhibits.

Q. Was he able to form an expert opinion as to what 29.01 contained, that substance?

A. Yes, he did.

Q. What was his opinion?

A. Cocaine hydrochloride.

Q. Now, after looking at his lab reports and his notes, are

Tr. 5/125

you able to form an expert opinion as to Exhibit 29.01?

A. Yes, I concur with him that it was cocaine hydrochloride with a purity of 83 percent.

Q. Now, those other kilos, roughly four kilos that were separated out of the 25 kilos, is that 29.02?

A. That's correct.

Q. And what test did he perform on those?

A. The same testing scheme and -- same testing scheme was run on those.

Q. Okay. And was he able to form an expert opinion as to the contents of 29.02?

A. Yes. That they too contained cocaine hydrochloride with a purity of 81 percent, with an additional substance known as diltiazem, D-I-L-T-I-A-Z-E-M.

Q. Do you know what that substance is?

A. It's a heart medication, and it's found in these four kilos at a fairly low level. Definitely far lower than the cocaine.

Q. Have you seen that appear -- that drug, that diltiazem appear in cocaine before?

A. We have. And it's a trend that we see sort of popping up, and these sorts of trends happen from time to time.

Q. Now, for 29.01 and 29.02 as the DEA marked them, were you

24 able to form an expert opinion as to what that is?
25 A. Yes.

Tr. 5/126

1 Q. What was your expert opinion for both of those?
2 A. That they both, 29.01 and 29.02, contain cocaine
3 hydrochloride. 29.01 purity of 83 percent, and 29.02 purity of
4 81 percent.
5 Q. We already stated it, but when we say 29.01 and 02, the
6 exhibits that you're looking at is that Government's 7, 8 and
7 9?
8 A. Government's 7, 8 and 9, correct.
9 Q. Okay. Were those sealed by Mr. Olson after he did the
10 testing?
11 A. They were sealed back up, yes.
12 Q. And did he put his name and initials on it?
13 A. Yes.
14 MR. NOZICK: At this point the government will move
15 into evidence what's been marked as Government's Exhibit 7, 8
16 and 9.
17 THE COURT: Any objection?
18 MR. JARRETT: Your Honor, we have no objections to

the conclusions reached by this witness. But for the objections previously stated, we would object to the admission of those items into evidence.

THE COURT: Are you talking about the matter that we spoke of at side bar?

MR. JARRETT. Yes, your Honor.

THE COURT: Mr. Alexander, any objection?

Tr. 5/127

DEFENDANT ALEXANDER: I adopt the same objection, your Honor.

THE COURT: Solely, that objection?

DEFENDANT ALEXANDER: Yes.

THE COURT: You don't object to the conclusion of what is there, but to the previous objection.

DEFENDANT ALEXANDER: Just to the admission.

MR. JARRETT: And before I cut you off, your Honor, there's another thing. As well as the chain of custody of the foundation because of the break in the time.

(Side bar discussion.)

THE COURT: You're going to have to explain that in more detail. That's different. And for the record, when we're

talking about the objection the other day, we were talking about the motion to suppress.

MR. JARRETT. Right, your Honor. The objection as to the chain of custody relates to the items that are now being offered into evidence having at one time allegedly been in that Dodge Magnum or removed from the Dodge Magnum on the 18th of August.

THE COURT: The items that were what?

MR. JARRETT: The items that are now being offered into evidence, the cocaine, allegedly having been removed from the Dodge Magnum on August 18th, 2004, were supposedly in that Dodge Magnum at the time. My client was driving that vehicle

Tr. 5/128

the previous day. There's still that gap in time between the time that he was stopped and the time that these items were removed from his car that we believe --

THE COURT: Mr. Jarrett, are you saying that there's no explanation to what happened after they took the car away from your client?

MR. JARRETT: Right.

THE COURT: And they tested it the next day?

MR. JARRETT: Right.

THE COURT: Same objection?

DEFENDANT ALEXANDER: Yes. Yes.

MR. NOZICK: Judge, we have established the legal chain of custody. The chain of custody goes from the time that it was recovered to the time it is tested and goes into evidence. It doesn't go from before it's recovered. We do believe we have established chain of custody. It's been in a secure DEA facility, and we have established it from the time that Mr. Jarrett is talking about and that it was secured in a DEA facility beforehand. We don't even have to prove chain of custody from then; it's chain of custody from getting out of the car --

THE COURT: Did you explain to Mr. Jarrett that the car was taken to the DEA headquarters in Merrillville, locked up and nobody else --

MR. JARRETT: That was one explanation offered, your

Honor, but the tow report does suggest --
(End of side bar.)
THE COURT: Objection overruled. Exhibits 7, 8 and 9
are all ordered admitted.
(Government's Exhibits 7, 8, 9 received in evidence.)
MR. NOZICK: Your Honor, I would ask that the witness
be allowed to take the contents out of the box and show it to
the jury?
THE COURT: You can.
BY MR. NOZICK:
Q. For the record, which box are you looking at first there?
A. I'll start with 7. Did you want me to identify each bag
as I pull it out?
Q. You may.
A. This is marked Exhibit 29, not .01 or .02, but just 29,
meaning that it's probably the collective packaginq of all 25,
and it's even marked original packaging. And it has
Mr. Olson's seal. And this appears to be all the original
packaging for the 25. Two of these packages are labeled as
brick 24 and brick 21 for Exhibit 29.0l. So these two go with
the 21 bricks, kilo bricks from Exhibit 29.01. The remaining

packages in here are all marked 29.02. This small one right here is roughly a 25-gram composite formed from the four kilos in 29.02.

Q. Mr. DeFrancesco, just to speed things up a bit. The box

Tr. 5/130

you're looking in, how many kilos of tested cocaine are in that one?

A. Six.

Q. Okay. Could you move to the next exhibit?

A. Certainly. Plus the composite.

Q. Thank you.

A. In Government's 8, this is a composite for 29.01 very similar to 29.02, roughly 25 grams.

(Brief pause.)

A. There are eight kilo packages in Government's 8, all labeled 29.01.

Q. Thank you. Now, you keep using the word kilo. That's 2.2 pounds in a kilo?

A. 1,000 grams, correct, approximately 1,000 grams or two and a quarter pounds.

Q. Okay. And is there a third box up there that you haven't opened up yet that's in evidence already?

A. This is Government's Exhibit 9.

(Brief pause.)
Q. How many kilos are in that package?
A. Eleven.
Q. So between the three exhibits that we have just entered,
how many kilos of powder cocaine are there?
A. Eleven, plus --
Q. I apologize.

Tr. 5/131

A. Six, 11 and six is 17, 18, 19, 20, 21, 22, 23, 24, 25.
Q. So between the three exhibits we have just entered, there
are 25 kilos of tested cocaine?
A. Yes, sir.
Q. You have talked about the different break up of four
kilos from the other 21 kilos, is that correct?
A. That's correct.
Q. But they all contain cocaine, is that right?
A. That's correct.
Q. The only -- is it accurate to say the only difference is
what some of the other agents were in there?
A. That, and a slight difference of the purity level.
Q. Okay.
THE COURT: Counsel, would you be so kind as to
remove the exhibits?
MR. NOZICK: Yes, that's what I'm going to do.

BY MR. NOZICK:
Q. Mr. DeFrancesco, was there also another roughly three kilos that were tested in another exhibit?
A. There was an Exhibit No. 30 submitted to the laboratory.
Q. Okay. And is that 159051?
A. That's correct.
Q. And are those marked as a Government's Exhibit?
A. Government's Exhibits 9-A and 9-B.
Q. Okay. Did Mr. Olson test those?

Tr. 5/132

A. Yes, he did.
Q. Can you tell from his lab report and the notes what tests were performed on those?
A. Essentially the same tests as the previous exhibit.
Q. And was he able to form an expert opinion as to the content of that exhibit?
A. That the four kilos contained cocaine hydrochloride.
Q. After looking at his notes and his lab report, were you able to form an expert opinion as to the contents of that exhibit?
A. Yes, I was.
Q. What's your expert opinion?
A. I concur with his that it was cocaine hydrochloride at a

purity of 81 percent.
Q. Did he weigh those?
A. Yes, he did. His net weight was 3,001 grams.
Q. Did he seal it up and write on the -- write his name on the sticker before putting it into evidence?
A. Yes. Here's his sticker on this one and here's his sticker on that one.
Q. Now, the purity of these, did you state a minute ago what the purity was?
A. The purity on Government's 9-A and B, 81 percent.
Q. Does that match the purity on some of the other cocaine that was tested?

Tr. 5/133

A. I believe 29.01 -- I'm sorry, 29.02 was likewise 81 percent.
Q. But that was the piece that had the diltiazem in it as well?
A. That's correct.
MR. NOZICK: At this point, your Honor, the government will move into evidence what's been marked as Government's Exhibit 9-A and 9-B.
THE COURT: Any objection?

MR. JARRETT: Same objections as previously stated both before today and at the bench just a few minutes ago, your Honor.

THE COURT: On the previous objection at side bar?

MR. JARRETT: Yes, your Honor --

DEFENDANT ALEXANDER: Same objection.

THE COURT: Objection overruled, 9-A and 9-B are both ordered admitted.

(Government's Exhibit 9-A, 9-8 received in evidence.)

MR. NOZICK: Thank you, sir.

BY MR. NOZICK:

Q. Just to make sure that --

THE COURT: Counsel, ask questions. The jury will make sure of whether to make sure.

MR. NOZICK: Good point.

BY MR. NOZICK:

Tr. 5/134

Q. Mr. DeFrancesco, I didn't miss any items that you tested or that Mr. Olson tested pertaining to this case, have I?

A. Not that I was notified of ahead of time.

MR. NOZICK: Nothing further.

THE COURT: Cross, Moon.

CROSS-EXAMINATION

BY MR. JARRETT:

Q. Mr. DeFrancesco, the testimony you have been providing today regarding the examination of these items, were they -- was the testing done in your laboratory in Chicago?

A. Yes, sir.

Q. Can you give us a rough estimate as to how much time was expended both by Mr. Olson and yourself to conduct the testing that allowed you to reach the conclusions that you testified to here today?

A. I'd have a hard time -- I'd have to give a real rough ballpark estimate as to how much time he had devoted to this. I would say for the smaller exhibits, somewhere between four to eight hours per exhibit. And then for the Exhibit 29, it was 25 kilos, so that's far more involved. And the fact that it had to be split and it had an unusual component in the one, it could be anywhere from -- I don't know, two days to do that one. So figure 16, maybe three days, 24 hours, and then possibly another eight to 16 hours on the last exhibit.

Q. Thank you. In your laboratory and the DEA in Chicago,